filed 9-14-81

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO. 81-5271

JOHN EDWARD SWINDLER — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
Attorney General

BY: WILLIAM C. MANN, III
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

ATTORNEYS FOR RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO. 81-5271

JOHN EDWARD SWINDLER — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Sixth and Fourteenth Amendment rights to effective assistance of counsel apply to the penalty phase of a bifurcated capital trial.

II. Whether due process in a capital case requires an opportunity to develop issues of ineffective assistance of counsel when ineffective assistance of counsel cannot be raised on direct appeal.

III. Whether a state statute that prohibits a second change of venue in a criminal case tainted by extensive prejudicial publicity violates a defendant's rights under the Sixth and Fourteenth Amendments to trial by a fair and impartial jury.

TABLE OF CONTENTS

	PAGE NO.
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTE INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT.....	3-8

I. PETITIONER WAS NOT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL MURDER TRIAL.....

II. PETITIONER WAS NOT DENIED HIS RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO DEVELOP EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL.....

II. PETITIONER WAS NOT DENIED A FAIR TRIAL BY AN IMPARTIAL JURY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BECAUSE A STATE LAW PERMITTING ONLY ONE CHANGE OF VENUE WAS NOT UNCONSTITUTIONALLY APPLIED TO DENY A SECOND CHANGE OF VENUE.....

CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

CASES	PAGE NO.
CARTER V. ILLINOIS, 329 U.S. 713 (1946).....	5
COLLINS V. STATE, 271 Ark. 825, 611 S.W.2d 182 (1981).....	4, 6
CUYLER V. SULLIVAN, 447 U.S. 335 (1980).....	6
DOUGLAS V. CALIFORNIA, 372 U.S. 353 (1963)...	6
DUPREE V. UNITED STATES, 606 F.2d 829 (8th Cir. 1979).....	3
GIBSON V. STATE, 351 So.2d 948 (Fla. 1977), cert. denied, 434 U.S. 1004 (1978).....	4
HYSLER V. FLORIDA, 315 U.S. 411 (1946).....	5
IRVIN V. DOWD, 366 U.S. 716 (1961).....	8
LEASURE V. STATE, 254 Ark. 961, 497 S.W.2d 1 (1973).....	4
MCMANN V. RICHARDSON, 398 U.S. 759 (1970).....	3
MCQUEEN V. SWENSON, 498 F.2d 207 (8th Cir. 1974).....	3
MURPHY V. FLORIDA, 421 U.S. 794 (1975).....	8
REECE V. GEORGIA, 350 U.S. 85 (1955).....	3
STONE V. POWELL, 428 U.S. 465 (1976).....	6
SWINDLER V. STATE, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 101 S.Ct. 630, 66 L.Ed.2d 511 (1980).....	7
SWINDLER V. STATE, 272 Ark. 340, ___ S.W.2d ___ (1981).....	3, 4
TOWNSEND V. SAIN, 372 U.S. 293 (1963).....	6
UNITED STATES V. EASTER, 539 F.2d 663 (8th Cir. 1976, cert. denied, 434 U.S. 844 (1977).....	3
YOUNG V. PAGAN, 337 U.S. 235 (1948).....	5

STATUTES	
Ark. Stat. Ann. §43-1507 (Repl. 1977).....	7
Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol 4A (Repl. 1977 & Supp. 1979).....	3, 4, 5, 6, 9

OPINIONS BELOW

The opinion of the Arkansas Supreme Court denying petitioner's petition to proceed under Rule 37 of the Arkansas Rules of Criminal Procedure is reported at 272 Ark. 340, ____ S.W.2d ___ (1981) and is reproduced in the petitioner's appendix.

JURISDICTION

The petitioner has adequately set forth the jurisdictional grounds.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The relevant constitutional and statutory provisions were stated by petitioner.

STATEMENT OF THE CASE

Respondent concurs with petitioner's statement of the case with the exception of his allegation that he has been denied any meaningful review of his claim for post-conviction relief.

REASONS FOR DENYING THE WRIT

I. PETITIONER WAS NOT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPTIAL MURDER TRIAL.

Petitioner initially asks this Court to review his conviction based upon his contention that he was "virtually without counsel" at the penalty phase of the trial. Petitioner's allegations were rejected by the Arkansas Supreme Court in its denial of his petition for post-conviction relief pursuant to Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Supp. 1979). Swindler v. State, 272 Ark. 340, ____ S.W.2d ____ (April 20, 1981).

Petitioner alleges that his counsel at trial failed to present evidence in mitigation despite the fact that there were indications that such evidence was available. Petitioner further alleges that, since the defendant bears the burden of presenting evidence of mitigating circumstances, when counsel fails to put on mitigating evidence he is not providing effective assistance.

This Court has held that a defendant is entitled to effective representation of counsel, Reece v. Georgia, 350 U.S. 85, 90 (1955). The Court has noted, however, that "all advice offered by the defendant's lawyer "need not" withstand retrospective examination in a postconviction hearing." McMann v. Richardson, 398 U.S. 759 770 (1970).

This Court has apparently declined to elaborate definitely on the standard to be applied in evaluating effective assistance of trial counsel. See McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974). Therefore, respondent respectfully submits that no more stringent standard should be applied here than was adopted by the Eight Circuit Court of Appeals in United States v. Easter, 539 F.2d 663 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977). This standard was summarized as follows in Dupree v. United States, 606 F.2d 829, 830 (8th Cir. 1979):

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." United States v. Easter, 539 S.2d 663, 666 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977). There is a presumption that counsel has rendered effective assistance. Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir.) cert. denied, 429 U.S. 868 (1976). To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned [sic] by the defense attorney to his client; and (2) that the failure prejudiced the defense. McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974).

Petitioner cites cases for the proposition that counsel has the duty to exercise diligence in locating and presenting witnesses during the penalty phase of a capital trial. Appellant would not quarrel with this. However, counsel is not obligated to manufacture evidence if none exists. Collins v. State, 271 Ark. 825, 611 S.W.2d 182 (1981). The Arkansas Court specifically noted:

> Counsel did not put on any evidence during the penalty phase of the trial and petitioner alleges that this can only be deemed ineffective assistance of counsel. Petitioner fails, however, to cite any evidence that was available. Clearly, counsel is not obligated to manufacture evidence if none exists. Since petitioner presented no specific evidence that could have been presented in mitigation, we cannot say that counsel was remiss in not presenting testimony during the penalty phase.

271 Ark. at 835.

See also Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied 434 U.S. 1004 (1978).

The Arkansas Supreme Court, in denying petitioner's Rule 37 petition, noted that the allegations made on this issue were based on the "alleged failure of the trial counsel to call certain witnesses and to develop certain testimony as to mitigating circumstances." Swindler v. State, 272 Ark. 340, ___ S.W.2d ___ (1981). The Arkansas Court cited Leasure v. State, 254 Ark. 961, 497 S.W.2d 1 (1973), wherein it was stated at page 968 of the opinion: "The calling of witnesses in a criminal trial is a matter which is normally within the realm of the judgment of counsel." The Court was therefore not convinced that petitioner's bare

allegations about what could have conceivably been used in the sentencing phase was sufficient to indicate that defense counsel was ineffective.

Respondent respectfully submits that the Arkansas Supreme Court ruled correctly in its denial of petitioner's Rule 37 petition and that petitioner has not sufficiently met his burden of proving that his trial counsel was ineffective.

II. PETITIONER WAS NOT DENIED HIS RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO DEVELOP EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner alleges that he was denied his right to due process under the Fourteenth Amendment because he was not granted an evidentiary hearing in the state trial court on his allegation that he was denied the effective assitance of counsel.

In challenging Rule 37 of the Arkansas Rules of Criminal Procedure, petitioner suggests that if a state provides for a post-conviction relief remedy, it should provide for a full and fair consideration of the rights involved. He contends that such fairness cannot occur absent the granting of a hearing. He contends that Rule 37 does not provide an adequate process for safeguarding these claims.

Respondent would note initially that this Court has never held that the Constitution compels the states to provide specific post-conviction procedures to persons claiming violations of their federal constitutional rights. Carter v. Illinois, 329 U.S. 173 (1946). Rather, this Court has stated that though the Constitution commands the states to assure fair judgment, wide discretion is left to the states in deciding the manner of adjudicating a claim that a conviction is unconstitutional. Young v. Ragan, 337 U.S. 235, 238 (1948); Hysler v. Florida 315 U.S. 411 (1946).

Therefore, petitioner has failed to raise an issue of constitutional proportion because this Court has never held

that the state equivalent of habeas corpus review is required under the United States Constitution. It has also been held that where such opportunity for relief is afforded, the scope of that review and the procedure by which relief may be granted are within the discretion of the state.

In support of petitioner's contentions, noted previously, he cites Douglas v. California, 372 U.S. 353 (1963); Stone v. Powell, 428 U.S. 465 (1976); Cuyler v. Sullivan, 447 U.S. 335 (1980); and Townsend v. Sain, 372 U.S. 293 (1963). These cases are all distinguishable and do not support petitioner's contentions. The issue in Douglas concerned the denial of assistance of counsel in the appellate process to indigent defendants based on a California rule of criminal procedure. Stone merely held that, where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. Cuyler dealt with multiple representation by counsel and does not appear to be on point. Townsend held that a district court erred in denying a writ of habeas corpus without a hearing since it appeared that the petitioner had confessed while under the influence of a "truth serum" drug.

Since petitioner had previously directly appealed his conviction to the Arkansas Supreme Court, he proceeded under Rule 37.2(a). This provision requires the permission of the Arkansas Court before the defendant may proceed in the trial court with his contentions. This is because Rule 37 is designed to afford the opportunity for relief to defendants who have not otherwise had an opportunity for review of their claims of constitutional violations. It is not intended to provide a second appeal. Collins v. State, 271 Ark. 825, 828, 611 S.W.2d 182 (1981). Petitioner evidently

complains that he was denied due process because he was not granted an evidentiary hearing as a matter of right. However, this is not the purpose of the rule as noted above.

Petitioner's allegations have been reviewed by the Arkansas Supreme Court and found not to justify an evidentiary hearing. This holding was based both on the substance of the allegation and the purpose and scope of review under Rule 37. This is all petitioner is entitled to.

III. PETITIONER WAS NOT DENIED A FAIR TRIAL BY AN IMPARTIAL JURY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BECAUSE A STATE LAW PERMITTING ONLY ONE CHANGE OF VENUE WAS NOT UNCONSTITUTIONALLY APPLIED TO DENY A SECOND CHANGE OF VENUE.

Petitioner contends that Ark. Stat. Ann. §43-1507 (Repl. 1977) was unconstitutionally applied to deny him a fair trial and that his counsel rendered ineffective assistance by not seeking affidavits or testimony to support a second change of venue even in light of the statute.

As petitioner notes, this issue was decided on direct appeal by the Arkansas Supreme Court in Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 101 S.Ct. 630, 66 L.Ed.2d 511 (1980). In responding to the argument concerning the second change of venue, the Arkansas Court noted:

> The second argument is meritless. The Arkansas law permitting only one change of venue, and that to a county within the judicial circuit, is not on its face unconstitutional. The case of Irvin v. Dowd, supra, does not support appellant's argument. The Court in Irvin ordered a trial in another county, contra to state law, because the trial judge refused a change of venue simply because state law forbade it. Also, the record in the Irvin case, like that in Swindler and Ruiz & Van Denton, was replete with evidence of pretrial publicity and a change of venue was necessary.
>
> It is not necessary for us to decide whether these venue laws can result in a denial of a right to a fair trial and due process of law. The question is, could Swindler receive a fair trial, by an impartial jury, in Scott County? We conclude he could.

267 Ark. at 427, 428.

The Arkansas Supreme Court also cited this Court's opinion in Irvin v. Dowd, 366 U.S. 716 (1961), wherein it was stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, wide-spread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U.S. 131; Holt v. United States, 218 U.S. 245; Reynolds v. United States, supra.

366 U.S. at 722, 723.

Petitioner contends that the Arkansas Supreme Court erroneously relied upon the "totality of the circumstances" test set forth in Murphy v. Florida, 421 U.S. 794 (1975), because of differences between that case and his case and contends that the "sheer numbers" of jurors with knowledge and opinions established a pattern suggesting a settled opinion regarding his guilt. Respondent maintains that there is no showing of such a pattern. The Arkansas Court noted that the trial court took great pains in selecting the petitioner's second jury. It is apparent that much precaution was taken to insure that he received a fair trial. Respondent respectfully submits that petitioner has demonstrated no violation of his constitutional right to a fair and impartial trial.

In response to petitioner's argument that his trial counsel was ineffective for failing to present affidavits or testimony in support of a second change of venue, respondent would again assert that petitioner has failed to meet his burden on the issue and refer the Court to the respondent's arguments under respondent's first reason for denying the writ.

CONCLUSION

The Arkansas Supreme Court has reviewed each of appellant's allegations. It properly followed the decisions of this Court and correctly denied petitioner's request for relief.

Petitioner failed to meet his burden of proving ineffective assistance of counsel. His allegations on this issue were properly rejected by the Arkansas Supreme Court without the granting of an evidentiary hearing pursuant to Rule 37.

Finally the Arkansas Court correctly found that petitioner was tried by a fair and impartial jury.

THEREFORE, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

STEVE CLARK
Attorney General

BY: William C. Mann III
WILLIAM C. MANN, III
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

ATTORNEYS FOR RESPONDENT